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AMAKANNU VEERAPAN & ORS

v.

MAYLAND DEVELOPMENT SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF JC
[CIVIL SUIT NO: S-22-354-2010]
30 JULY 2010

C ***CIVIL PROCEDURE:*** *Affidavits - Swearing of - Order 41 r. 5 Rules of the High Court 1980 - Whether affidavit could be sworn by a third party - Whether personal knowledge of the facts sworn in affidavit required - Whether affidavit admissible*

D ***CIVIL PROCEDURE:*** *Time - Statutory time limit - Plaintiffs seeking to enforce a tripartite agreement against defendant - Whether this constituted a land recovery action - Whether plaintiffs' claim time barred*

CIVIL PROCEDURE: *Striking out - Application to strike out action - Whether plaintiff had locus standi to bring the action - Whether plaintiff* E *had reasonable cause of action - Whether plaintiffs' claim frivolous - Whether plaintiffs' claim time barred*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Whether injunction would deprive defendant of its rights over land - Whether loss* F *suffered could be compensated - Whether plaintiff able to give undertaking as to damages*

The plaintiffs were former estate workers of Batu Estate ('the estate') which was part of a piece of land ('said land') owned by Semantan Estate Sdn Bhd ('Semantan'). The said land was then G sold to Sri Hartamas Sdn Bhd ('Sri Hartamas'). A tripartite agreement ('TA') was reached between the plaintiffs, Semantan and Sri Hartamas; one of the terms of the TA was that the Sri Hartamas would give a low cost house to each of the plaintiffs. The said land was subsequently sold to the defendant. The H plaintiff sought *inter alia* to enforce the TA against the defendant and applied for an interim injunction against the defendant from demolishing the plaintiffs' houses on the land. The defendant on the other hand made an application to strike out the plaintiffs' claim. The defendant's affidavit was sworn by a third party *ie*, the I Chairman of the Advisory Board Member and Squatters and

Housing Committee of DBKL. The issues to be determined were (i) whether the defendant's affidavit was inadmissible; (ii) whether the plaintiff's claim could be struck out; and (iii) whether the injunction could be granted.

Held (dismissing the plaintiffs' application and allowing the defendant's application):

(1) The plaintiff objected to the admissibility of the defendant's affidavit. They contended that the affidavit was sworn by a person not related to the proceeding. Since this was not a final hearing but an interlocutory one, it would be highly misconceived at this stage to disallow the admissibility of the affidavit, as it can be affirmed based on one's personal knowledge of the matter therein. (para 19)

(2) The plaintiffs' reliance on O. 41 r. 5(1) Rules of the High Court 1980 ('RHC') was of no assistance. The affidavit was sworn for the purpose of being used in interlocutory proceedings and contained statements of information or belief with the sources and grounds thereof. This was provided for in O. 41 r. 5(2) RHC and hence it could not be struck out. (paras 20 & 26)

(3) The total 31 plaintiffs did not have *locus standi* for differing reasons. Three of the plaintiffs entered into the land with license for a specific purpose that was to work in the estate; their licence was terminated when the land was sold to Sri Hartamas and the estate ceased to operate. The other five no longer occupied the land and thus were estopped from making this claim. The remaining plaintiffs were never given license or consent to occupy the land and therefore had no right to make a claim against the defendant. (paras 28 to 37)

(4) The plaintiffs' entire cause of action was premised on the TA. The TA did not contain the names and signatures of the parties involved and there was no evidence that it was duly stamped. The plaintiffs were therefore relying on an unsigned and undated agreement. The plaintiffs' action stood on a speculative piece of evidence and thus the plaintiffs did not have a reasonable cause of action against the defendant. (paras 38 & 44)

(5) The defendant was not a party to the TA. There was no link or privity of the defendant to the TA. Thus it had no legal obligation under the TA. Furthermore, there was no provision under the TA that binds the successor or heirs of the TA *ie*, the defendant. The plaintiffs' application to enforce the TA was highly misconceived and their action was therefore frivolous. (paras 47-50)

(6) Even if the defendant was bound by the TA, the plaintiffs' cause of action was time barred. The plaintiffs argued that their action was a recovery of land action and thus the limitation period was 12 years. Since the plaintiffs were seeking specific performance of the TA, it was therefore a cause of action under contract, and thus the limitation period was six years. (paras 51-53)

(7) If the application for the injunction was granted, it would tantamount to depriving the defendant, who was the purchaser and rightful owner of the land, of its rights. The defendant would incur huge amount of loss that could not be compensated by the plaintiffs. Furthermore, the plaintiffs were in no position to give any undertaking as to damages. There were no special circumstances adduced by the plaintiff that could exempt the plaintiffs from giving an undertaking as to damages in the event the injunction was wrongly granted. (paras 68-71)

Case(s) referred to:

Ex p Public Bank Bhd [2001] 7 CLJ 10 HC ***(refd)***

Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd [2009] 1 LNS 162 HC ***(refd)***

Mega Sakti Sdn Bhd v. Wong Wai Hoi & Ors & Another Appeal [2008] 3 CLJ 674 CA ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Padang Serai Kilang Kayu Bhd v. Khor Kia Fong & Ors [1997] 5 CLJ 428 HC ***(refd)***

Syarikat Jeleta Bumi Sdn Bhd & Anor v. Nadarajah Ramasamy & Ors [2003] 2 CLJ 427 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 114

Limitation Act 1953, ss. 6, 9(1)

Rules of the High Court 1980, O. 18 r. 19(1), O. 41 rr. 5(1), (2), 6, O. 89

For the plaintiff - K Selvakumaran (SP Muthu Veloo with him); M/s SP Veloo & Co
For the defendant - Wong Kian Kheong (TS Yeoh with him); M/s Wong Kian Kheong

Reported by Melinda Robert

JUDGMENT

Zabariah Mohd Yusof JC:

[1] Enclosure 15 is the application by the defendant to strike out the claim by the plaintiffs under O. 18 r. 19(1) Rules of the High Court 1980.

[2] Enclosure 3 is an *inter partes* injunction by the plaintiffs, amongst others, to restrain the defendant from demolishing the plaintiffs' houses lands held under Grant No 9413 Lot No 26643 and grant No 9414 Lot No 26644 in the Mukim of Batu, District of Kuala Lumpur, owns by the defendant.

[3] Both enclosures were heard together as the issues are intertwined.

Background Facts

[4] The property in question are all that pieces of lands held under Grant No 9413 Lot No 26643 and grant No 9414 Lot No 26644 in the Mukim of Batu, District of Kuala Lumpur and State of Wilayah Persekutuan (herein after referred to as the said land).

[5] The said lands were once part of a rubber estate known as Batu Estate. The said Batu Estate and the adjoining Segambut Estate belonged to Semantan Estate Sdn Bhd.

[6] The case of the plaintiffs is as follows:

[7] The plaintiffs are amongst the former estate workers who had worked in Batu Estate and/or their successors-in-title and as such were allegedly allowed to stay on the land.

[8] On or about 1978-1979, Semantan Estate Sdn Bhd was desirous of selling the said estates to Sri Hartamas Development Sdn Bhd.

[9] Various meetings were held between Semantan Estate Sdn Bhd, Sri Hartamas Sdn Bhd and the representatives of the said estates. As a result of the meetings an understanding was reached between the parties which was later reduced to writing in an agreement (hereinafter referred to as "the Tripartite Agreement").

[10] Plaintiffs contend that they are one of the parties in the Tripartite Agreement between Semantan Estates Sdn Bhd (Semantan Estate), Sri Hartamas Development Sdn Bhd (Sri Hartamas) and Batu Estate Employees.

[11] One of the terms of the Tripartite Agreement is that Sri Hartamas agreed to develop and give a low cost house to each of the Ladang Batu Estate employee. The said houses are to be developed in a land held under Geran No 9413 Lot 26643 and Geran No 9414 Lot No 26644 Mukim Batu KL.

[12] The said land was subsequently bought by the defendant from Sri Hartamas on 16 November 1998 pursuant to a Settlement Agreement (exh. SAA1 of encl. 15B). The land is no longer an Estate land and is still being occupied by some of the plaintiffs.

[13] Recently on 9 April 2010, the defendant had entered into a settlement agreement with some of the Batu Estate employees (31 of them) whereby the defendant would pay RM10,000-RM30,000 as *ex gratia* payment in consideration of vacant possession of the land to be given to the defendant.

[14] As the structure of the houses in the land was built very close and connected to each other, the plaintiffs contend that the demolition of one would affect the other houses.

[15] Hence, the plaintiffs in their writ of summons pray for:

i) a declaration that the alleged Tripartite Agreement is valid;

ii) a declaration that the alleged Tripartite Agreement binds the defendant;

iii) specific performance of the Tripartite Agreement;

iv) mandatory injunction to compel the defendant to provide the plaintiffs each a low cost house; and

v) damages *in lieu* of performance.

[16] The plaintiffs aver the following grounds in making this application:

i) the defendant would demolish the said houses and the plaintiffs' action herein would be nugatory if the injunction is not granted.

ii) To maintain *status quo* of the land pending the disposal of the plaintiffs' action herein.

[17] The defendant avers the following in opposing the application for an interim injunction:

i) The defendant had entered into a settlement agreement with 31 of the employees on 9 April 2010 and many of them have left their houses and left vacant;

ii) The defendant bought the land in 1999 and it was bought with a hefty payment. From 1999 and till to date the defendant cannot develop the land as the squatters still stay there and refused to leave the land;

iii) There are no issues to be tried.

The Court's Findings

Preliminary Objection By The Plaintiff On encl. 28 ie, An Affidavit In Reply Of The Defendant

[18] The objection is on encl. 28, as a 3rd party had sworn an affidavit of the defendant and that there is no proof that the deponent had been authorized or appointed as the Chairman of the Advisory Board Member and Squatters and Housing Committee of DBKL.

[19] It is to be noted that this is an interlocutory hearing and not a final hearing to dispose of the entire suit. The plaintiff is objecting on the admissibility of the affidavit. It is highly misconceived at this stage for the court to disallow the admissibility of the said affidavit, as an affidavit can be affirmed based on one's personal knowledge of the matter therein. If there is to be any issue it would be on the weight that ought to be attached to it, not on the issue of admissibility.

[20] Order 41 r. 5 Rules of the High Court 1980 relied on by the plaintiff is of no assistance to the plaintiff. It reads as follows:

> 5.(1) Subject to O. 14, r. 2(2) and 4(2), to para (2) of this rule and to any order made under O. 38 r. 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[21] As a general rule, O. 41 r. 5(1) regulates the contents of an affidavit *viz* only such facts as the deponent is able of his own knowledge to prove. As an exception, O. 41 r. 5(2) allows an affidavit, sworn for the purpose of being used in interlocutory proceedings, to contain statements of information or belief with the sources and grounds thereof. The case of *Mega Sakti Sdn Bhd v. Wong Wai Hoi & Ors & Another Appeal* [2008] 3 CLJ 674 and *Ex p Public Bank Bhd* [2001] 7 CLJ 10 can be distinguished from our present case. In the case of *Mega Sakti* it involves the application by the appellants who were purchasers of a condominium, for leave to intervene in the proceedings between the respondent (developer) and another party and to set aside the stay order of a winding up order. The affidavit in support of the application was affirmed by one Dr. William Lau who was a total stranger to the proceedings and there has not been any confirmation by the appellants therein that the deponent had been authorized to act for them. The court held that "To emphasis on the "stranger" aspect he could not have any personal knowledge of the sources of any of his assertion or its truth as he never was one of the purchasers". Hence the court had no hesitation in rejecting Dr. William Lau's affidavit which was in support of the appellant's application to intervene. In this case Dr William Lau was a total stranger in that he was not authorized by the appellant and neither was he one of the purchasers. Still the court in Mega Sakti did not rule that the affidavit was inadmissible. Similarly in the case of *Re Public Bank*, it involves the seeking of an order under s. 114 of the Companies Act 1965 that the lodgement with the registrar of companies of registration of two charges it had created in respect of two pieces of land be extended. This is not in relation to an interlocutory application. There the deponent was a person with no specific function but

had been authorized by the applicant to affirm an affidavit. But what is pertinent to observe in *Re Public Bank* is that the said affidavit was not ruled as inadmissible but the court merely states that the affidavit was inadequate to support the application therein (refer to p. 338 para B to C of the report) and that the supporting affidavit failed to meet up with the requirement under s. 114 of the Companies Act 1965 (refer to p. 338 para E of the report). Again nowhere the court had ruled that the affidavit was inadmissible.

[22] From both of the cases shown, the courts did not rule that the affidavits was inadmissible or to be struck out. The court may order any affidavit to be struck out if it considers such affidavit as scandalous, irrelevant or otherwise oppressive (O. 41 r. 6 Rules of the High Court 1980), which is not the case here.

[23] The deponent in encl. 28 avers that he is the Chairman of the Advisory Board Member and Squatters and Housing Committee of DBKL and has personal knowledge as to the position of squatters in the Federal Territory of Kuala Lumpur. He further avers in para 4 of encl. 28 that:

> saya telah dilantik, selaku jawatan saya sebagai salah seorang ahli lembaga penasihat DBKL, oleh Timbalan Menteri Wilayah Persekutuan Y.B, M. Saravanan untuk mengendalikan semua hal ehwal perkara mengenai penduduk-penduduk ... diatas tanah-tanah yang dimiliki Defendan ...

[24] The contents of the other paragraphs of enclosure explained the deponent's scope of work as "ahli lembaga penasihat DBKL" which includes matters pertaining to movement of the occupiers out of the land, provision of alternative accommodation to the occupiers and the demolition of the houses of the occupiers of the said land in question.

[25] The deponent avers that due to his designation he has gone to the said lands and is familiar with the occupants of the same.

[26] The deponent was affirming "such facts as the deponent is able of his own knowledge to prove". He is not a stranger to the matter in issue which is pertaining to the occupiers of the said land, and that is precisely what he avers in his affidavit. Enclosure 28 is an affidavit sworn for the purpose of being used in interlocutory proceedings which contain statements of information

A or belief by the deponent with the sources and grounds thereof. Hence encl. 28 cannot be struck out.

[27] Therefore the preliminary objection of the plaintiff encl. 28 is dismissed.

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Locus Standi Of The Plaintiff

[28] Some of the plaintiffs do not have *locus standi* to bring this action as according to the census made by DBKL in 29 October 2009 only 52 families were staying at the said land at the material C time, (exh. SAA1 of encl. 6).

[29] On 9 April 2010, defendant had entered into a settlement agreement with 31 of the settlers whereby payment of *ex gratia* was made to the 31 occupants. These 31 occupants have D received the *ex gratia* payment and agreed to vacate the land.

[30] Out of 31 plaintiffs in this suit herein:

i) only the 3rd plaintiff, 4th plaintiff and the 24th plaintiffs are formerly Estate Workers and are occupying the land. (first E category);

ii) The 1st, 5th, 6th, 25th, and 29th plaintiffs are formerly Estate Workers and they are no longer occupying the land; (2nd category);

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iii) The rest of the plaintiffs were not estate workers nor were they occupying the land (3rd category).

[31] In this respect exh. RC1 of encl. 28 is referred.

G **[32]** For the 1st category of plaintiffs they entered the land with license from Semantan Estate which was for a specific purpose ie, to work in the Estate. This licence was terminated when Batu Estate ceased operation and the land was sold by Semantan Estate to Sri Hartamas.

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[33] Even if it was argued that the 1st category had the consent from Semantan Estate and Sri Hartamas to occupy the land with consent, the consent was revoked when Sri Hartamas sold the land to the defendant and the defendant had never given any I consent to the plaintiffs.

[34] Clearly the "consent" and the "license" have both expired, thus the 1st category of plaintiffs are actually trespassers and squatters to the land.

[35] For the 2nd category of plaintiffs they are no longer occupying the land and is thus estopped from claiming for any interest on the land.

[36] For the 3rd category of plaintiffs there has never been any licence nor consent for the occupation of the land. Hence the 3rd category of plaintiffs have no right to claim against the defendant for any interest on the land.

[37] Therefore clearly the plaintiffs have no locus to bring this claim against the defendant.

No Issues To Be Tried

[38] The plaintiff's entire cause of action is premised on the Tripartite Agreement.

[39] The alleged Tripartite Agreement was allegedly signed by the Estate workers. Refer to exh. SAA2 of encl. 15B. The terms of the said agreement are:

i) Sri Hartamas agreed to allow the Estate workers to occupy the land for as long as they were on temporary employment in the estates and the Land was not yet required for housing development;

ii) Sri Hartamas would offer each worker the purchase of one unit of low cost house in their development; and

iii) Sri Hartamas would consider a nominal discount of RM500 per house for the Estate workers.

[40] A perusal of the Tripartite Agreement shows that:

i) it does not contain any signature and name of Semantan Estate's representative;

ii) it does not contain any signature and name of Sri Hartamas's representative;

iii) it does not contain the names and signatures of all of the estate Workers;

A iv) it does not contain date of the alleged Tripartite Agreement; and

v) it does not have any evidence of it being stamped under the Stamp Act 1949.

B **[41]** Since 26 December 2001, the plaintiffs' solicitors had written to Koperasi NESA and the Federal Territory Labour Department for a copy of the duly signed and sealed of the alleged Tripartite Agreement allegedly dated 1978, but to no avail.

C **[42]** Since the plaintiff is alleging that there was a Tripartite Agreement entered between the parties, the burden is on the plaintiff to show:

– the existence of the Tripartite Agreement;

D – that it is a validly executed agreement entered between the parties;

– the obligations of parties that ought to be enforced.

E **[43]** To date these have not been proven.

[44] Hence the substratum of the plaintiff's cause of action is premised on an unsigned and an undated agreement. I agree with the submission of the defendant that the action of the plaintiffs herein stands on a speculative piece of evidence. There is thus no reasonable cause of action against the defendant.

[45] Further, even assuming for a moment, that the Tripartite Agreement was validly executed and existed with proper terms, it is to be observed that the Tripartite Agreement was between:

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i) ex employees of the estate;

ii) Semantan Estate Sdn Bhd;

iii) Sri Hartamas Sdn Bhd.

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[46] It is to be noted that, except for plaintiffs 1, 3-6, 24-25 and 27, the rest of the named plaintiff herein are not ex employee of the Batu Estate (refer exh. BE3 of encl. 2).

I

[47] The defendant is not a party to the Tripartite Agreement as exhibited in BE2 of the plaintiff's 1st affidavit in encl. 2. There is no link or privity of the defendant to the Tripartite Agreement which renders the Tripartite Agreement unenforceable against the defendant.

[48] Hence, the defendant has no legal obligation under the terms of the Tripartite Agreement. The enforcement, if any should be against Semantan Estate Sdn Bhd and Sri Hartamas Sdn Bhd, not the defendant. Moreover the Agreement exhibited in BE2 is only a draft.

[49] There is also no provision in the Tripartite Agreement that states that it will bind the successors or heirs of the Agreement ie, the defendant.

[50] Since the defendant is not a party in the Tripartite Agreement, the relief sought by the plaintiffs for specific performance of the Tripartite Agreement against the defendant is highly misconceived. The action by the plaintiffs herein is clearly frivolous.

[51] In any event, if assuming for a moment that the defendant is bound by the Tripartite Agreement, the plaintiffs are barred by the Limitation Act 1953 as the Tripartite Agreement was executed in 1976. Section 6 of the Limitation Act 1953 provides that any action founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. I agree with the submission of the defendant's counsel that there are two possible dates by which the plaintiff's cause of action could have accrued ie:

i) In 1978 when the alleged Tripartite Agreement was signed; or

ii) On 16 November 1998 when the Settlement Agreement between the vendors and the defendant was signed, as that was the date when the promise to provide the houses to the plaintiffs failed to materialise.

[52] The plaintiff's counsel cited case law authorities and states that the limitation period is not based on a breach of contract but based on the recovery of land and hence the limitation period is 12 years pursuant to s. 9(1) of the Limitation Act 1953. In any event, counsel for the plaintiff submits that whether s. 6 or s. 9

of the Limitation Act 1953 applies, is by itself a triable issue, and it ought to be determined at full trial and not dismissed summarily.

[53] My view on the issue of limitation is that it involves the construction of documents and determination of issues on points of law. Merely to determine the question of limitation period does not require a full trial or the evidence of witnesses at a full blown hearing. The plaintiffs are seeking for specific performance of the alleged Tripartite Agreement. Clearly the cause of action is on breach of contract. Nowhere have the plaintiffs relied on s. 9(1) of the Limitation Act 1953 ie, recovery of land, in their pleadings. The cases cited by the plaintiffs are inapplicable to our case herein as they relates to *bona fide* purchasers (not squatters) of land seeking for reliefs of specific performance.

[54] In *Nasri v. Mesah* [1970] 1 LNS 85 it concerns specific performance of a Sales and Purchase Agreement which was entered between the plaintiff and the defendant. The prayer of the plaintiff there was for an order that the defendant does execute a valid and a registrable transfer of the land. "In effect he was seeking to do was to obtain the land by a judgment of the court".

[55] The case of *Padang Serai Kilang Kayu Bhd v. Khor Kia Fong & Ors* [1997] 5 CLJ 428 also with regards to the claim of the plaintiff for a declaration that the land belongs to him and also for specific performance of the agreement between the parties.

[56] Similarly in *Filati Lastex Elastofibre (M) Sdn Bhd v. Nikseng Development Sdn Bhd* [2009] 1 LNS 162 is also for specific performance of a Sales and Purchase Agreement which was entered between the plaintiff and the defendant.

[57] All the three cases above relates to recovery of land pursuant to a Sale and Purchase Agreement which was entered between the parties. Rightly so, the limitation period should be 12 years pursuant to s. 9 of the Limitation Act 1953. None of the cases cited involved squatters.

[58] In our case herein it relates to the plaintiffs who have no licence or consent to remain on the land which was owned by the defendant. The fact as stated at para 9(a) of the Settlement Agreement between the vendor and the defendant (exh. SAA1 of encl. 15B) dated 16 November 1998, that the land was sold to

the defendant by the vendor on an "as is where is" basis does not connotes recognition of squatters rights. There was no agreement on the part of the defendant when the land was sold by the vendors to the defendant that the defendant was to take the land with the squatters.

[59] The plaintiffs also sought to rely on the case of *Syarikat Jeleta Bumi Sdn Bhd & Anor v. Nadarajah Ramasamy & Ors* [2003] 2 CLJ 427 where it was submitted that the facts are on all fours with our case herein. It was held in that case that "the balance of convenience tilted very much in favour of the defendants who had been in occupation of the premises for a number of generations. To ask them to vacate and caused the quarters to be demolished would certainly have caused the defendants great hardship, having regard to the fact that they are poor people with no alternative place to stay."

[60] However, on reading the facts of *Syarikat Jeleta Bumi Sdn Bhd* shows the facts can be distinguished with our present case. In *Syarikat Jeleta Bumi Sdn Bhd*, "there was a meeting of 19 October 2001 between the plaintiffs and NUPW where it was stated in the minutes of meeting that the workers will only vacate their quarters upon receiving their new low cost houses from the developer". And in another meeting of 6 November 2001 it was stated that 'the condition given by the state government is the developer must build alternative housing for the workers before they could vacate their quarters'." Ultimately, in *Syarikat Jeleta Bumi Sdn Bhd* it is stated "Hence with such evidence the defendants have shown that they have a claim to proprietary interest in the said land. This is a triable issue which should not be summarily dismissed without trial."

[61] In contrast to the facts in our case, the plaintiffs herein have not shown any evidence that they have a proprietary interest as was present in the case of *Syarikat Jeleta Bumi Sdn Bhd*.

[62] Further, the plaintiffs sought to rely on a "without prejudice" letter in exh. LD1 encl. 29 in support of the argument that there is a fresh accrual cause of action.

[63] However my view on this is that, firstly, the said letter is a "without prejudice" letter. It is pertinent to note that parties often make statement "without prejudice" as part of an attempt to settle a dispute. When this is done, the contents of the statement cannot be put in evidence without the consent of both parties. The statements often relate to the offer of a settlement and, were it not for the privilege, they would constitute significant items of evidence on the ground that they were admissions. It is in the public interest that disputes are encouraged to be settled to reduce litigation to a minimum. The policy of the law has been in favour of enlarging the cloak under which negotiations may be concluded without prejudice.

[64] Secondly, there is no admission of liability on the part of the defendant in the said letter.

[65] Thirdly, the proposal for settlement in that letter was meant to be for another suit which was pending.

[66] Therefore the plaintiffs' cause of action is frivolous and vexatious as it is time barred pursuant to s. 6 of the Limitation Act 1950.

[67] Balance Of Convenience

i) The defendant is the owner of the said lands since 1999;

ii) During these 11 years the defendant has not been able to develop the land due to the presence of the plaintiffs who have no rights or interests on the land;

iii) the lands were bought by the defendant at a high price;

iv) the defendant has been paying assessment and quit rent on the land since 1999. Copies of the receipts of payments of quit rent and assessment are exhibited in exhs. SAA9 of encl. 8.

v) the defendant has been deprived of the pecuniary benefits which it ought to have reaped from the development of the land which they owned;

vi) Plaintiffs 1, 2, 5-7, 9-10, 14-21, 25-31 are not the occupiers of the land according to the census done by DBKL;

vii) There are a lot of dilapidated houses on the land.

viii) Although the settlement agreement had been executed by the defendant with the 31 occupants on the land, in the event the application of the plaintiffs are allowed by this court, the defendant would be deprived from executing its lawful rights under the settlement agreement.

[68] If the application for injunction by the plaintiffs is to be allowed that would tantamount to depriving the defendant, who are the purchasers of the land and thus are the rightful owners of the same, of their rights. The defendants would incurred huge amount of losses in which could not be compensated by the plaintiffs herein.

[69] As far as the plaintiffs are concerned they do not have any proprietary rights on the land as opposed to the defendant.

Undertaking As To Damages

[70] There is no undertaking as to damages by the plaintiff. In any event the plaintiffs are in no position to give any undertaking as to damages.

[71] There are no special circumstances adduced by the plaintiff that can exempt the plaintiffs from giving an undertaking as to damages in the event the granting of the injunction against the defendant was wrong. This is in direct opposition to the defendant who is in a position to compensate for damages to the plaintiffs in the event the injunction is not granted.

Whether Damages Is An Adequate Remedy

[72] It is clear from the alternative reliefs prayed for by the plaintiff those damages are an adequate remedy.

[73] Thus the balance of convenience tilts in favour of the court in not granting the injunction against the defendant.

Issue Of Two Earlier Applications Made Under O. 89 Which Were Not Allowed By The Court

[74] At that point in time when the matter was heard before Justice Azmel Maamor for an application under O. 89 of the Rules of the High Court 1980, the burden was on the defendant to

prove that there was no triable issue. It may well have been that the defendant has failed to discharge the burden of proof for the application at the trial of the said matter under O. 89 Rules of the High Court 1980.

[75] In any event this court is not bound by the decision of Justice Azmel Maamor which is a decision of another High Court of co-ordinate jurisdiction.

[76] Therefore based on the abovesaid reasons, encl. 15 is allowed with costs.

[77] Enclosure 3 is dismissed with costs.